In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1331

AUSTIN HARRIS AND JOSEPH LYLE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. I) is reported at 358 F. 2d 279.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1966, and a timely petition for rehearing was denied on April 19, 1966 (Pet. App. II). The petition for a writ of certiorari was filed on May 18, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioners' convictions on the conspiracy count of the indictment.

2. Whether the charges against petitioners should have been severed for trial.

STATEMENT

After a trial by jury in the Northern District of Illinois, petitioners were convicted under a seven-count indictment (D. App. 2-6)[1] charging substantive narcotics violations and conspiracy. Counts I and II charged Richard Stepney with offenses committed on April 17, 1962; Counts III and IV charged petitioners with offenses committed later the same day; Counts V and VI accused petitioner Lyle of committing similar offenses on April 24, 1962; and the last count charged petitioners and Stepney with conspiracy to commit the substantive crimes charged in the preceding six counts.[2] Harris was sentenced to imprisonment for seven years on each of the three

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[1] In addition to the petition with its appendix, a copy of Appellants' Brief and Appendix in the court of appeals and a copy of the Brief and Appendix for Appellee in the court of appeals have been filed with the Clerk of this Court. These documents are referred to herein as "D. App." and "G. App." respectively.

[2] The indictment originally also included charges against Leroy Cates in counts V and VI and in the conspiracy count, but these charges were dismissed before petitioners' trial (D. App. 28 and 53). Stepney pleaded guilty to Counts I, II and VII prior to trial (Pet. 7, n. 2).

counts in which he was involved, the sentences to run concurrently, and Lyle received concurrent sentences of twelve years on each of the five counts in which he was involved (G. App. 1a-3a).

At trial it was shown that on April 17, 1962, Agent Clarence Cook of the Federal Bureau of Narcotics met defendant Stepney through an informer (D. App. 18) and purchased a "spoon" of heroin from him. Cook saw petitioner Harris standing nearby (D. App. 9). That afternoon, while negotiating a second purchase of narcotics, Cook told Stepney he would not buy any more heroin unless he met the source of supply (D. App. 17). Stepney replied that he was dealing with some very prominent and dangerous people in the narcotic traffic, and that his source of supply was not particularly interested in meeting anyone new (D. App. 18). Stepney, however, who had earlier referred to Harris as his source (D. App. 28), did introduce Cook to Harris. During the ensuing conversation, Harris asked the agent how he liked the "stuff" delivered earlier that day. Cook replied that the quality was good, but that he did not get a full spoon (D. App. 10). Harris said that if Cook bought more heroin that day, he would make up for the shortage in the first spoon (D. App. 10). Harris assured Cook that he was associated with "large people" in the narcotics traffic (D. App. 10). A deal was made for three more spoons for which Cook paid. That night—April 17—Harris and Lyle made delivery (D. App. 11-13).

Cook saw Lyle one week later at the cab company where Lyle worked and where Cook had been told that Harris could be reached (D. App. 12, 26). Lyle arranged to meet Cook that evening. At that time, he told Cook that he and Harris were partners and that while Harris was not around he would take care of Cook (D. App. 13-14). Cook then bought an ounce of heroin from Lyle (D. App. 14-15).

ARGUMENT

1. The evidence established a conspiracy embracing both petitioners and Stepney. Harris' participation in a conspiracy with Stepney was shown by his appearance on April 17 at the time of the first sale to Cook by Stepney and by his offer to Cook later that day—after Stepney had introduced Harris to Cook as Stepney's source—to make good a shortage in the earlier sale. Lyle's participation in the conspiracy was shown by his joint delivery with Harris on April 17 of the narcotics sold by Harris to Cook earlier that day and by Lyle's explicit admission to Cook one week later of a partnership with Harris in the sale of narcotics. Harris also stated to Cook that he was associated with others in his illegal activities, and there was sufficient independent evidence of a conspiracy between Harris and Lyle to make Lyle's admission of a partnership between them admissible against Harris. *Glasser* v. *United States*, 315 U.S. 60, 74.[3] Fi-

[3] Similarly, Stepney's statement to Cook about his dealing with prominent and dangerous people in the drug traffic was admissible against both petitioners. This was a statement in furtherance of the conspiracy, designed to assure Cook of the integrity and reliability of the source of narcotics.

nally, in addition to the evidence of conspiracy, there was unquestionably ample evidence against each petitioner under the substantive counts to support the concurrent sentences imposed.

2. Since the conspiracy was proved, the joinder of defendants and substantive counts was proper. In all events, the joinder here was proper because of the close relationship between the three sales and the joint participation of the petitioners in the second sale. The second sale was plainly the direct outgrowth of the first sale, and in the third sale Lyle told Cook that he was substituting for Harris—who had negotiated the first two sales—in his absence. Thus, the relationship among substantive offenses required by *Schaffer* v. *United States*, 362 U.S. 511, and *Ward* v. *United States*, 289 F. 2d 877 (C.A. D.C.), upon which petitioners rely, was satisfied here. The instructions of the court (D. App. 55-58), moreover, fully protected the right of each petitioner to be tried for his own conduct on the evidence applicable to him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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